

Claimant needs a lumbar laminectomy and fusion as a result of his October 12, 1995, work-related accident. Claimant requests surgery at the Craig Hospital in Denver, Colorado, by Dr. Scott P. Falci of Englewood, Colorado. Dr. Falci, however, demands assurance that his fees, which are greater than those set forth by the Kansas Workers Compensation Schedule of Medical Fees (fee schedule), will be paid.

The Judge found extraordinary circumstances which required extraordinary treatment and, therefore, the Judge ordered respondent to pay the amount authorized for exceptional cases. In addition, the Judge ordered that if the fee schedule did not contain any provision for addressing exceptional cases, respondent was ordered to pay the fee requested by Dr. Falci. The Judge's ruling reads, in part:

The court is persuaded by claimant's testimony at the post award hearing wherein he explained in detail the type of treatment he needs and the many complications which may result from inadequate treatment. The court concludes that claimant has an [extraordinary] medical circumstance which does require extraordinary treatment. Dr. Scott Falci is authorized to provide the recommended treatment. The responsibility of respondent and its insurance carrier for payment of Dr. Falci's fees is limited to the amounts authorized for exceptional cases.

The Kansas Workers Compensation Act speaks specifically to how exceptional cases are to be paid. K.S.A. 44-510i(c)(1) provides as follows: "The schedule shall include provisions and review procedures for **exceptional cases involving [extraordinary] medical procedures or circumstances** and shall include costs and charges for medical records and testimony." (Emphasis added by the Judge.)

The court has approved claimant's request for authorized medical treatment as an extraordinary medical circumstance. If the Kansas Fee Schedule does not yet contain said payment provisions for exceptional cases, then respondent and its insurance carrier are ordered to pay the fee requested by Dr. Falci.¹

Respondent contends the surgical procedures proposed by Dr. Falci are not extraordinary and, therefore, Dr. Falci must accept payment allowed by the medical fee schedule. Next, respondent maintains a post-award hearing for medical treatment is not the appropriate procedure to address the issue of Dr. Falci's fees as the correct procedure is peer review established in K.S.A. 44-510j. In short, respondent requests the Board to reverse the June 18, 2009, order.

Claimant, on the other hand, requests the Board to affirm the June 18, 2009, order as these are exceptional circumstances.

The issues before the Board on this appeal are:

1. Should the June 18, 2009, order be reversed because claimant failed to utilize the appropriate procedure in seeking authorization for Dr. Falci's services?

¹ Post Award Medical order (June 18, 2009) at 3.

2. Did claimant establish that this was an exceptional case involving extraordinary medical procedures or circumstances to justify payment to Dr. Falci in a sum greater than that set forth in the medical fee schedule?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' briefs, the Board finds and concludes that the June 18, 2009, order should be modified.

As indicated above, claimant requests authorization for Dr. Scott P. Falci to operate on his back and receive a fee in excess of that set forth in the fee schedule. The Workers Compensation Act provides that a medical fee schedule shall be created and that it *shall* contain provisions and review procedures for exceptional cases. K.S.A. 2008 Supp. 44-510i(c) reads, in part:

The director shall prepare and adopt rules and regulations which establish a schedule of maximum fees for medical, surgical, hospital, dental, nursing, vocational rehabilitation or any other treatment or services provided or ordered by health care providers and rendered to employees under the workers compensation act and procedures for appeals and review of disputed charges or services rendered by health care providers under this section;

(1) The schedule of maximum fees shall be reasonable, shall promote health care cost containment and efficiency with respect to the workers compensation health care delivery system, and shall be sufficient to ensure availability of such reasonably necessary treatment, care and attendance to each injured employee to cure and relieve the employee from the effects of the injury.

The schedule shall include provisions and review procedures for exceptional cases involving extraordinary medical procedures or circumstances and shall include costs and charges for medical records and testimony. (Emphasis added.)

K.S.A. 2008 Supp. 44-510i(e) reiterates that the fee schedule is to contain a procedure for addressing exceptional cases.

All fees and other charges paid for such treatment, care and attendance, including treatment, care and attendance provided by any health care provider, hospital or other entity providing health care services, shall not exceed the amounts prescribed by the schedule of maximum fees established under this section ***or the amounts authorized pursuant to the provisions and review procedures prescribed by the schedule for exceptional cases.*** . . . (Emphasis added.)

Claimant's counsel represents he has spoken with the Division of Workers Compensation medical administrator, who is charged with helping prepare the fee

schedule and developing a medical utilization review program,² about provisions in the fee schedule for exceptional cases. And counsel represents no such procedure exists. Accordingly, claimant initiated this request for the approval of the charges that Dr. Falci intends to charge for his services.

The Board has reviewed the medical fee schedule and it, likewise, is unable to find any provisions in the document for addressing exceptional cases. Moreover, the only rule or regulation the Board found that addresses the medical fee schedule and which is somewhat pertinent to the issue now before us is K.A.R. 51-9-7, which provides:

Fees for medical, surgical, hospital, dental, and nursing services, medical equipment, medical supplies, prescriptions, medical records, and medical testimony rendered pursuant to the Kansas workers compensation act shall be the lesser of the usual and customary charge of the health care provider, hospital, or other entity providing the health care services or the amount allowed by the “workers compensation schedule of medical fees” published by the Kansas department of labor, dated January 1, 2008, and approved by the director of workers compensation on June 15, 2007, including the ground rules incorporated in the schedule and the appendices, which is hereby adopted by reference. . . .

The Board is unaware of any provisions in the fee schedule that provide the parties a procedure for addressing exceptional cases. Accordingly, the Board finds it was appropriate for claimant to file this post-award request seeking authority for Dr. Falci to operate on claimant’s back and be paid in a sum exceeding the amounts set forth in the medical fee schedule. As indicated above, respondent argued claimant should have followed the peer review process set forth in K.S.A. 44-510j. Although that procedure may be appropriate in certain instances, the Board finds it is not the only procedure that may be utilized. Moreover, the statute creating the utilization and peer review procedures addresses medical services that have been provided rather than charges and procedures that are contemplated. For example, K.S.A. 44-510j begins, as follows:

When an employer’s insurance carrier or a self-insured employer disputes all or a portion of a bill **for services rendered** for the care and treatment of an employee under this act, the following procedures apply (Emphasis added.)

It is axiomatic that the legislature would not have directed the fee schedule to contain provisions addressing exceptional cases if the utilization and peer review procedures set forth in K.S.A. 44-510j were intended to address those issues.

² K.S.A. 44-510i(b).

In summary, the Board concludes that in exceptional cases or circumstances as referenced in K.S.A. 2008 Supp. 44-510i(c) injured workers may file post-award requests with the administrative law judges seeking approval of contemplated medical charges that exceed the fee schedule, until such time the fee schedule is supplemented with "provisions and review procedures for exceptional cases involving extraordinary medical procedures or circumstances."³

Claimant testified at his May 2009 hearing why he felt it was important to undergo back surgery at the Craig Hospital in Denver, Colorado. The Board agrees with claimant's contention that there are exceptional circumstances and reasons why claimant should undergo surgery at that hospital. In short, the hospital specializes in treating severely disabled individuals such as claimant who is paralyzed below the waist. Claimant explained, in part:

First of all, Dr. Falci and other doctors that come into Craig Hospital's outpatient are entities of themselves. They are not Craig Hospital. That is the reason why the fee is different than what Craig Hospital's fee is. Each one of them is billed separately. I wanted to make that clear, that they are not part of Craig Hospital, that they are -- that is where they work out of, is Craig Hospital. . . .

The problem has been -- if I go and have Dr. Falci do [the surgery], in surgery, they know how to pad you, they know how to handle you, they know -- they work with paraplegics day in and day out. When you are done with the surgery, you go into Craig Hospital to rehab from the surgery. His nurse takes care of you over there. She changes the bandages once or twice a day. It is all done -- the nursing staff knows how to come in every four hours and turn you. They have the facilities, they have the commode chairs, the shower chairs, the facilities to be able to take a shower.

I have been in the Wichita hospital and the local hospital at home. They do not have any facilities. I have to furnish my own equipment in those hospitals. The nursing staff has no clue on how to take care of a paraplegic. . . .⁴

There is no evidence in the record to refute claimant's testimony. Accordingly, there are exceptional circumstances to justify using Craig Hospital in connection with claimant's back surgery.

³ K.S.A. 2008 Supp. 44-510i(c)(1). See also *Harrell v. Criqui Construction Company*, No. 190,912, 1997 WL 762981 (Kan. WCAB Nov. 26, 1997).

⁴ P.A.H. Trans. (May 5, 2009) at 16-18.

On the other hand, at this juncture the record does not address what circumstances justify Dr. Falci requesting fees in excess of the fee schedule. Claimant's testimony does not really address the surgical procedure. Likewise, there is no evidence from a medical expert that addresses whether Dr. Falci's intended surgery involves extraordinary medical procedures or that there is some other circumstance to justify a higher fee. As respondent adroitly noted, out-of-state providers are subject to the Kansas fee schedule.

Medical treatment provided by Out-of-State Providers: For any service (emergency or non-emergency) that is provided by an out-of-state provider, and if a claim is filed under the Kansas Workers Compensation Law, reimbursement for such service is to be limited to the maximum allowable payment contained within the appropriate sections of this fee schedule. Thus, any out-of-state provider who willingly provides medical service to an injured worker who is seeking benefits under the Kansas Workers Compensation Law, must realize that said service is to be limited to this fee schedule and should take the necessary steps to receive authorization from the insurance company, employer, or payer prior to providing said service. Prior authorization for such services should be obtained to assure that the processing of a Workers Compensation claim will not be denied. Additionally, absent any pre-approval by the insurance company, employer, or payer, balance billing the injured worker, or any other party, for the services provided is prohibited.⁵

Because the record fails to establish that Dr. Falci's intended fee is due to exceptional medical procedures or circumstances, the request that his charges be paid in excess of the fee schedule must be denied.

There is no dispute that claimant needs the contemplated back surgery. And respondent does not dispute claimant's request that the surgery be performed at the Craig Hospital. Accordingly, respondent should provide claimant with the names of three qualified orthopedic surgeons or neurosurgeons from which claimant may select one who utilizes the Craig Hospital.

WHEREFORE, the Board modifies the June 18, 2009, Post Award Medical order. The Board reverses the order that requires respondent to pay Dr. Falci's bill at this time. But the Board orders respondent to provide claimant within 30 days three names of orthopedic surgeons or neurosurgeons who utilize the Craig Hospital in Denver, Colorado.

IT IS SO ORDERED.

⁵ *Kansas Workers Compensation Schedule of Medical Fees* (2008) at 2.

Dated this ____ day of September, 2009.

BOARD MEMBER

BOARD MEMBER

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CONCURRING OPINION

We agree the Kansas medical fee schedule does not contain a procedure to address exceptional cases involving extraordinary medical procedures and circumstances. Therefore, we agree injured workers may file with the administrative law judges post-award applications seeking approval of contemplated medical charges exceeding the fee schedule. We also agree that the record fails to establish that Dr. Falci's estimated fee exceeds the fee schedule due to exceptional or extraordinary circumstances. But, in addition to requiring respondent to provide claimant with the list of doctors, we would also authorize Dr. Falci to perform surgery upon claimant for his requested fee in the event respondent failed to provide that list within 30 days.

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge